> which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other states or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases, the commerce on such waters would have a substantial economic effect on interstate commerce.

116 Cong. Rec. 8985 (March 24, 1970).[3] Moreover, in 1971, EPA's General Counsel opined that the term "navigable waters of the United States" was used in its traditional sense in the 1970 Act. *See* EPA General Counsel Opinion (Dec. 9, 1971).

Two years after enactment of section 11, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (hereafter, "1972 Amendments"). Pub. L. No. 92-500, 86 Stat. 816 (1972). The 1972 Amendments carried forward the oil pollution control provisions of section 11, with some amendments not relevant here, and redesignated section 11 as section 311. Pub. L. No. 92-500, § 2, 86 Stat. 862 (1972) (current version at 33 U.S.C. § 1321 (2000)). The Conference Report stated that section 311 was intended to be "basically the same as

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[3] Senator Muskie later used similar language to describe the CWA section 502(7) definition of "navigable waters" – added by the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) – in his manager's statement on those 1972 Amendments. *See infra* at 11.

existing law," *i.e.*, basically the same as the 1970 enactment. S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 132, 133 (1972), *reprinted in* 1 Congressional Research Service, Legislative History of the Water Pollution Control Act Amendments of 1972 at 315, 316 (1973) (hereafter, "1972 Legislative History"). Under then existing law, the "navigable waters of the United States" meant traditional navigable waters, as shown above.

It is possible, of course, that Congress intended section 311 to have a narrower scope than other provisions of the CWA.[4] However, it is the position of the United States that section 311 has the same scope as sections 404 and 502(7), 33 U.S.C. §§ 1344, 1362(7) (2000) (at issue here), as well as section 402, 33 U.S.C. § 1342 (2000). This is demonstrated by the practically identical language of the several definitions of "navigable waters" or "waters of the United States" in the regulations that purportedly implement those statutory provisions. *Compare* 33 C.F.R. § 328.3(a) (2005) *with* 40 C.F.R. § 112.2 (2005) *and* 40 C.F.R. § 122.2 (2005). If all of those statutory provisions do have the same scope, then the history of section 311 must be considered in defining that scope.

The history of section 311 establishes that its original scope was limited to traditional navigable waters, and that Congress did not intend to enlarge that scope (*i.e.*, did not intend to depart dramatically from "existing law") in the 1972 Amendments. Assuming, *arguendo*, that the scope of section 311 is the same as the scope of the rest of the CWA,

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[4] In fact, in its pending motion for summary judgment in *API v. Johnson*, No. 02-2247 (D.D.C. filed Nov. 14, 2002), API has argued in the alternative that if other provisions of the CWA are held to reach far beyond traditional navigable waters in their use of the term "navigable waters" or "waters of the United States," then section 311 must have a narrower scope than the rest of the CWA.

any suggestion that Congress intended to go far beyond traditional navigable waters in sections 404 or 502(7) is extremely difficult to reconcile with the history of section 311.[5] In fact, as shown below, the language and legislative history of those other provisions establish a continued focus upon protecting traditional navigable waters (waters subject to the federal servitude), while otherwise preserving state authority to protect state waters.

## II. Congress' Objectives In The 1972 Amendments

In addition to carrying forward the oil spill prevention provisions of former section 11 (now section 311), the 1972 Amendments added significant new regulatory programs aimed at protecting water quality. In particular, the 1972 Amendments established the National Pollutant Discharge Elimination System ("NPDES"), which requires a permit from EPA for the discharge of "pollutants" to the "navigable waters;" and the section 404 program, which requires a permit from the Army Corps of Engineers ("Corps") for the discharge of "dredged or fill material" to the "navigable waters." Pub. L. No. 92-500, § 2, 86 Stat. 844, 880, 884, 886 (1972) (current versions at 33 U.S.C. §§ 1311, 1342, 1344, 1362(12) (2000)).

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[5] In the late 1970's, the courts of two federal circuits held that the section 502(7) definition of "navigable waters" governs the scope of section 311, and that navigability is irrelevant. However, those cases were decided long before *SWANCC*, and it does not appear that the courts considered the full history of section 311, as discussed herein. *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324-25 (6th Cir. 1974). *See Ward v. Coleman*, 598 F.2d 1187, 1188 n.1 (10th Cir. 1979) (dictum), *rev'd*, 448 U.S. 242 (1980); *Wyoming v. Hoffman*, 437 F. Supp. 114, 115-16 (D. Wyo. 1977) (dictum).

In a new section 502(7), the 1972 Amendments defined the pivotal term "navigable waters" as "the waters of the United States, including the territorial seas." Pub. L. No. 92-500, § 2, 86 Stat. 886 (current version at 33 U.S.C. § 1362(7) (2000)). At the same time, Congress declared its policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources . . . ." Pub. L. No. 92-500, § 2, 86 Stat. 816 (1972) (current version at 33 U.S.C. § 1251(b) (2000)).

### A. The language of the definition of "navigable waters"

Exactly why Congress chose to define "navigable waters" as "the waters of the United States" is not clear from the face of the statute. However, given Congress' stated policy of preserving state primacy over state water resources, it may well be that Congress wanted to distinguish federal waters (covered under the Act) from other waters (to be regulated by the states). After all, the term "navigable waters" has been described as "defin[ing] a federal servitude, derived from the commerce clause, that overlays what might otherwise be considered state waters," *Northern Cal. River Watch v. City of Healdsburg*, 2004 U.S. Dist. LEXIS 1008, *18 (N.D. Cal. Jan. 23, 2004).

In any event, both the phrase "navigable waters" and the phrase "waters of the United States" had an established meaning in federal law, *i.e.*, traditional navigable waters. Congress had previously used the terms "waters of the United States" and "navigable waters of the United States" interchangeably in section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (2000). Section 10 has been held to apply only to traditional navigable waters. *United States v. Stoeco*

*Homes, Inc.*, 498 F.2d 597, 608-10 (3d Cir. 1974). Moreover, as long ago as 1871, the District Court in *The Daniel Ball* case had used the phrase "waters of the United States" to mean traditional navigable waters:

> I regard it to be well settled doctrine of the supreme court of the United States, that all waters within the United States which are navigable for the purpose of commerce, or in other words, waters whose navigation successfully aids commerce, are *waters of the United States*.

*The Daniel Ball*, 6 F. Cas. 1161, 1163 (W.D. Mich.), *rev'd on other grounds*, 77 U.S. (10 Wall.) 557 (1871) (emphasis added). *See* Black's Law Dictionary 1761 (4th ed. rev. 1968) (defining "Waters of the United States" and citing *The Daniel Ball*).

Moreover, had Congress intended in the 1972 Amendments to cover purely state waters, in addition to traditional navigable waters, it knew how to say so. In the Water Quality Act of 1965, Congress had provided for development grants to states and cities for controlling discharges of inadequately treated sewage into "any waters." Pub. L. No. 89-234, § 3, 79 Stat. 903, 905 (1965). Congress could have employed the same term in the 1972 Amendments, but instead used the narrower term "waters of the United States."

B. The legislative history of the definition

The legislative history of the 1972 Amendments confirms that Congress used the terms "navigable waters" and "waters of the United States" in their traditional sense. It also demonstrates Congress' intent that the concept of

traditional navigable waters be understood by reference to modern federal case law. *See generally* Albrecht and Nickelsburg, *Could SWANCC Be Right? A New Look At The Legislative History Of The Clean Water Act*, 32 Envtl. L. Rep. 11042, 11044-46, 11048-49 (2002).

The explanatory statements of the Senate and House floor managers both describe "navigable waters" with reference to their use as a "highway" or part of a "highway" in interstate commerce. *See* 1 1972 Legislative History at 178 (Statement of Senator Muskie), 250-251 (Statement of Congressman Dingell). Senator Muskie used language in his statement nearly identical to language he had used to describe the term "navigable waters of the United States" in section 11 two years earlier. *Compare* 1 1972 Legislative History at 178 *with* 116 Cong. Rec. 8985 (March 24, 1970).

At the same time, the two floor managers' statements and the Conference Report all expressed a desire that the term "navigable waters" be given "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." 1 1972 Legislative History at 178, 251, 327. The legislative history compiled by the Congressional Research Service does not explain what were the "agency determinations" made for "administrative purposes" about which Congress had been concerned. However, a broader look at the legislative history shows that Congress had been frustrated with the Corps of Engineers' implementation of the Rivers and Harbors Act and with EPA's interpretation of the 1970 version of FWPCA.

Before enactment of the 1972 amendments to FWPCA, the Rivers and Harbors Act had been viewed as a potentially useful federal mechanism for controlling water pollution. However, until 1970, the Corps had not regulated

dredging or filling in aquatic areas shoreward of harbor lines, even though under the old *Daniel Ball* definition of "navigable waters of the United States," the Corps plainly had the authority to regulate such areas. The House Committee on Government Operations expressly found fault with the Corps' policy, as reflected in its report of March 1970, entitled "Our Waters And Wetlands: How The Corps of Engineers Can Help Prevent Their Destruction And Pollution." H.R. Rep. No. 917, 91st Cong., 2d Sess. 6-10 (1970).[6]

Another concern was that the Corps had not been regulating waters not presently navigable in fact, even though under cases such as *Economy Power & Light Co. v. United States*, 256 U.S. 113 (1921) and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940), the "waters of the United States" included waters that had at one time been navigable in fact (although presently obstructed) and waters that could be navigable, with reasonable improvement. In 1972, the Conservation and Natural Resources Subcommittee of the House Committee on Government Operations held hearings "concerning the role of the Corps of Engineers in administering and protecting our Nation's wetlands and waterways," and in August the full committee issued a report, entitled "Increasing Protection For Our Waters, Wetlands, And Shorelines: The Corps Of Engineers." H.R. Rep. No. 1323, 92d Cong., 2d Sess. 1 (1972). In its report, the committee criticized the Corps for its narrow approach:

> The corps' regulations currently define navigable waters as those "which are

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[6] In May 1970, the Corps changed course and promulgated a rule regulating activities shoreward of harbor lines. 35 Fed. Reg. 8280 (May 27, 1970) (amending 33 C.F.R. § 209.150).

> navigable in fact when they are used, or are susceptible of being used, in their ordinary condition," for conducting trade or travel "in the customary modes of trade and travel on water." (33 C.F.R. 209.260 (a).) That language is based on similar language used over 100 years ago in the Supreme Court's opinion in *The Daniel Ball* . . . .
>
> However, more recent judicial opinions have substantially expanded that limited view of navigability to include waterways which would be "susceptible of being used * * * with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, etc.

*Id.* at 29-30.[7]

Finally, the Corps had declined to exercise jurisdiction over intrastate lakes, even if navigable-in-fact, because such lakes did not, in the precise words of *The Daniel Ball*, "form . . . by themselves, or by uniting with other waters, a continued highway over which commerce is . . . conducted by water," 77 U.S. (10 Wall.) at 563. The Committee on Government Operations apparently believed that railroad or highway links between navigable intrastate lakes and other states should be sufficient to establish federal jurisdiction, and that modern case law supported this view:

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[7] Congressman Dingell repeated language from this hearing report in his floor statement on the 1972 Amendments. *See* 1 1972 Legislative History at 250-51.

> Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation (highways, railroads, air traffic, radio and postal communication, waterways, etc.). The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of a navigable interstate or international commercial highway." *Utah* v. *United States*, 403 U.S. 9, 11 (1971); *U.S.* v. *Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972).

H.R. Rep. No. 1323, 92d Cong., 2d Sess. 30 (1972).

Although Congress' expressed discontent was focused on the Corps, Congress presumably also was aware that in 1971, EPA's General Counsel had issued an opinion concerning the scope of the term "navigable waters of the United States" in then section 13 of the FWPCA, which regulated sewage discharges from vessels. EPA General Counsel Opinion (Dec. 9, 1971). The opinion addressed navigable intrastate waters lacking a *water* connection to other states, which might nonetheless be linked to other states by railroads or highways (essentially the same issue on which the Committee on Government Operations had disagreed with the Corps, discussed immediately above).

The opinion said that "[s]uch waters have never been held to be within the 'navigable waters of the United States,'

and the possibility of securing such a holding is remote." *Id.* Significantly, the General Counsel recommended against asserting authority over such waters because that action would only marginally increase federal regulatory coverage, and "[t]his additional margin . . . does not appear to justify the legal and *administrative difficulties* it presents." *Id.* (emphasis added).

Thus, it is clear that the "agency determinations" made for "administrative purposes" about which Congress complained in the 1972 legislative process involved the federal agencies' failure to assert jurisdiction over traditional navigable waters as fully as justified under modern federal case law. The focus of Congress' frustration appears to have been the Corps, but Congress was likely also disappointed with EPA's position.

Thus, in defining "navigable waters" as the "waters of the United States" in the 1972 FWPCA Amendments, Congress intended only to reach traditional navigable waters, although it intended that such waters be understood to be as extensive as described in modern federal case law. In other words, Congress wanted to ensure that the agencies would exercise their full constitutional power *over navigation.*

In *SWANCC*, this Court confirmed that Congress' focus in 1972 was upon traditional navigable waters. 531 U.S. at 168 & n.3, 172. This Court also confirmed its opinion in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), that in the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977), Congress had acquiesced in the Corps of Engineers' assertion of CWA jurisdiction over wetlands abutting traditional navigable waters. 531 U.S. at 167, 170-72.

### C. The regulation of the "discharge of pollutants"

Although Congress focused the federal effort upon protection of water quality in traditional navigable waters (and their abutting wetlands), and chose to have the states retain primary authority to protect water quality in waters traditionally regarded as state waters, *see SWANCC*, 531 U.S. at 166-67, Congress gave EPA and the Corps adequate tools to protect traditional navigable waters from pollution from or through upstream sources, such as non-navigable tributaries. Specifically, Congress prohibited the "discharge" of pollutants, except in compliance with a section 402 NPDES permit or a section 404 permit to discharge "dredged or fill material." 33 U.S.C. § 1311(a) (2000). *See also* 33 U.S.C. §§ 1321(a)(2), (b)(3) (2000).

The term "discharge of pollutants" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2000). The term "point source" is defined to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, *ditch, channel*, tunnel, conduit, well, discrete fissure . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2000) (emphasis added). Thus, the addition of pollutants to navigable waters through a ditch is prohibited, except in compliance with a permit. But that does not mean the ditch is a "navigable water."

Similarly, a common dictionary definition of "channel" is "the bed where a natural stream of water runs." Webster's Ninth New Collegiate Dictionary 226 (1988). Thus, a non-navigable tributary adding pollutants to a navigable water (either directly or through another non-

navigable tributary[8]) can be a "point source" and subject to regulation, but not because the non-navigable tributary is a "navigable water" or "water of the United States." Conversely, a ditch or non-navigable channel that receives pollutants but that itself cannot reasonably be expected to convey pollutants to navigable waters (either directly or through another point source) is *not* subject to regulation under the CWA. However, it can still be regulated as a state water by the applicable state. *See* S. Novick (ed.), 1 Law Of Environmental Protection § 7:9 & n.2 (2004) ("[C]ommon . . . is a provision prohibiting the 'discharge' of any 'pollutant' into the 'waters of the state' without a permit. Virtually every state has a provision of this type.").

There are many cases where it is highly probable that a discharge to a tributary (in particular a primary tributary) will result in an addition of pollutants to traditional navigable waters. But there are also many cases where a discharge to a remote "tributary" cannot reasonably be expected to reach traditional navigable waters.

This is certainly true in the oil and gas industry, where many production wells and pipeline facilities are located in arid areas near normally dry streambeds or washes that eventually lead through a lengthy series of drainages to traditional navigable waters. A spill of oil or produced water could reasonably be expected to reach the dry streambed or wash, but in many such cases could not reasonably be expected to reach traditional navigable waters. While such a spill may never reach traditional navigable waters, such a spill can be cleaned up before a precipitation event even

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[8] *See South Fla. Water Mgt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 105 (2004) ("a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.' ").

begins to cause any migration toward traditional navigable waters.

In such instances, the CWA would not apply. However, the states may, and generally do, regulate discharges of oil to state waters, and require that they be cleaned up promptly. *See* D. Selmi & K. Manaster, State Environmental Law § 18:1 (2003) ("Liability for oil spills has long been a prominent feature on the landscape of state environmental law"). *See generally id.* at ch. 18.

## III. Where The Sixth Circuit Errs

Underlying the Sixth Circuit's opinions in the present cases is the notion that the CWA was intended to protect water quality in traditional navigable waters. That much of the Sixth Circuit's reasoning is surely correct, given this Court's conclusion in *SWANCC* that "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172.

But the Sixth Circuit errs in its understanding of how Congress went about protecting traditional navigable waters. In essence, the Sixth Circuit's theory is that because **A** (a non-navigable water or wetland) might somehow affect **B** (a traditional navigable water), therefore **A** ***is*** **B**. *See United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004) ("'[a]ny contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters.'") (citation omitted). Yet this theory enjoys no support in the statute. It is made of whole cloth, presumably in an effort to accomplish the perceived ends of the statute.

This Court has often cautioned against reliance upon the general ends of a statute to enlarge or otherwise alter its intended reach. This Court has explained that

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises.

*Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). *See also Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.") (emphasis in the original).

In fact, CWA jurisprudence in most of the lower federal courts appears to have been largely purpose-driven both before and after this Court's decision in *SWANCC*. Before *SWANCC*, the prevailing theory was that to protect water quality as broadly as possible, Congress had directed EPA and the Corps to regulate any waters that might be regulated under the federal power to regulate interstate commerce. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979) ("Every court to discuss the issue has used a commerce power approach . . . ."). Following *SWANCC*'s rejection of this "full extent of the commerce power" theory, many of the federal circuits

(including the Sixth Circuit here) have shifted to a new purpose-driven theory, *i.e.*, since Congress wanted to protect traditional navigable waters, any aquatic area with any hydrological connection with traditional navigable waters must itself be *deemed* a traditional navigable water, and subject to federal protection. *See United States v. Gerke Excavating Inc.*, 412 F.3d 804, 807 (7th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3309 (U.S. Nov. 11, 2005) (No. 05-623); *Rapanos*, 376 F.3d at 639; *United States v. Deaton*, 332 F.3d 698, 711-12 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004).

Yet Congress' very specific regulatory scheme in the CWA must be given effect, even though some may believe that scheme does not go far enough to serve the ends of the statute or represent the perfect balance of policy choices. In the CWA, Congress asserted authority over traditional navigable waters (and their abutting wetlands), including the authority to protect such waters from upstream pollution. But Congress chose to protect traditional navigable waters by regulating additions of pollutants to such waters (whether directly or through ditches, channels, or other "point sources") -- *not* by rendering subject to federal regulation all activities affecting non-navigable, state waters. Congress relied upon the states to regulate activities affecting only state waters.

Here, if the Corps can show Mr. Rapanos' wetland-filling activities result in an addition of pollutants to traditional navigable waters, then those activities may be regulated. But this is quite different from the Corps' current approach, approved by the Sixth Circuit, under which the mere potential for drainage from a distant wetland to a traditional navigable water renders the wetland itself a "navigable water."

Similarly, if the Corps can show that filling of the Carabells' property results in an addition of pollutants to traditional navigable waters, then that activity may be regulated. But mere proximity to a traditional navigable water, in the absence of any hydrological connection, cannot render a wetland a "navigable water." In fact, in the *Carabell* case, the only proximity is to a non-navigable "tributary" of a traditional navigable water. Thus, the wetlands on the Carabells' property cannot even be said to be "inseparably bound up" (*SWANCC*, 531 U.S. at 167) with traditional navigable waters.

## IV. Implications Of The Sixth Circuit's Holdings

If, as the Sixth Circuit holds, any hydrological connection with a traditional navigable water renders an area a "navigable water," then even normally dry hillsides would be "navigable waters," assuming there is at least occasional precipitation. One could start tracing paths of drainage at the highest point in the Rocky Mountains and follow them to the sea – and every land mass drained along the way would be "navigable waters." Thus, the potential area of the nation covered as "navigable waters" could be far greater even than the 100 million acres of wetlands (an area itself the size of California) that petitioners Rapanos, *et al.* referred to in their reply brief on the petition for certiorari, *see* Reply Br. of Petitioners Rapanos, *et al.* (On Petition) at 10.

As a result, remote oil and gas production and pipeline facilities could be required to prepare and implement SPCC plans under section 311, even where they have no reasonable likelihood of ever affecting traditional navigable waters. Also, such facilities currently are subject to fines for spills to remote, dry stream beds and washes, even if the spills are promptly cleaned up and never get

anywhere near navigable waters. *See* 33 U.S.C. §§ 1321(b)(6), (b)(7) (2000).

Moreover, under the mere proximity test of the *Carabell* case, man-made retention ponds at industrial facilities, such as petroleum refineries, pipeline facilities, or natural gas plants (located close to, but with no surface hydrological connection to, traditional navigable waters), could be "navigable waters." This would make no sense, as such ponds are specifically designed to prevent or limit the addition of pollutants to traditional navigable waters. Their mere operation in catching and holding pollutants could now be subject to NPDES permitting.[9]

Even assuming, *arguendo*, that a "significant nexus" with traditional navigable waters is enough to render any non-navigable water or wetland "navigable waters," *see Rapanos*, 376 F.3d at 639, the Sixth Circuit's theories make a mockery of this Court's concept. *Cf. SWANCC*, 531 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."). If, as under *Rapanos*, *any* hydrological connection constitutes a "significant nexus," then very little land area would not have a "significant nexus" with traditional navigable waters. *Carabell* makes the mockery complete, holding that merely being *close* to an area that has *any* hydrological connection with traditional navigable water establishes a "significant nexus" with traditional navigable waters.

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[9] In some cases, water from the retention basins is pumped to the facility's waste water treatment plant and discharged to navigable waters. That discharge is subject to NPDES permitting. But that is quite different from regulating the retention basins themselves as "navigable waters."

## CONCLUSION

The judgments in cases 04-1034 and 04-1384 are based on a faulty construction of the CWA and should be reversed.

Respectfully submitted,

December 2, 2005

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Nos. 04-1034 and 04-1384

In The
# Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; And PINE RIVER BLUFF ESTATES, INC.,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

JUNE CARABELL, et al.,

*Petitioners,*

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

*Respondents.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF AMERICAN PLANNING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTIONS PRESENTED FOR REVIEW

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to non-navigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

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## INTEREST OF *AMICUS CURIAE*[1]

The American Planning Association ("APA") is a nonprofit, public interest and research organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels – including land use, economic, and social planning. The APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 46 regional chapters and 19 divisions devoted to specialized areas of planning, including the Environment, Natural Resources and Energy Division, which promotes the adoption of scientifically sound and effective policies to promote protection of the environment and the wise and sustainable use of natural resources and energy. The APA represents more than 38,500 professional planners, commissioners, and citizens involved in formulating and implementing planning policies and land-use regulations.

The APA has submitted *amicus curiae* briefs in many landmark cases of importance to the planning profession, including: *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886,

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

120 L.Ed.2d 798 (1992); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002); and most recently in *Kelo v. City of New London*, 125 S.Ct. 2655, 73 USLW 4552, 162 L.Ed.2d. 439 (2005); *Lingle v. Chevron*, 125 S.Ct. 2074, 73 USLW 4343, 161 L.Ed.2d 876 (2005); *City of Rancho Palos Verdes v. Abrams*, 125 S.Ct. 1453, 73 USLW 4217, 161 L.Ed.2d 316 (2005); and *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S.Ct. 2491, 73 USLW 4507, 162 L.Ed.2d 315 (2005).

As the need arises, the APA develops policy guides that represent the collective thinking of its membership on both positions of principle and practice. Such policies are developed through a strenuous process that involves examination and review by both the chapters and divisions of APA. In April 2002, the Policy Guide on Wetlands was ratified by the Board of Directors. *Available at* http://www.planning.org/policyguides/wetlands.htm [last accessed on December 30, 2005].

## STATEMENT OF THE CASE

*Amicus* American Planning Association adopts the statement of the case as set forth by Respondent.

## SUMMARY OF ARGUMENT

At the heart of Petitioners' position, and the amici that support them, is their desire to escape the jurisdictional requirements of the Clean Water Act in order to avoid the regulatory oversight needed to protect wetland resources. While this position may be consistent with the immediate and short-term needs of the current property owners, it is short-sighted and in conflict with the public interest and the needs of society in the long-term.

Wetlands are complex and critical resources which should be protected, enhanced and restored, where feasible, in order to increase the quality and quantity of the nation's wetland resource base. The American Planning Association supports the goal of no net loss of the nation's remaining wetlands. This goal requires reasonable regulatory oversight of activities which may impact wetlands and a broad interpretation of "navigable waters" to include isolated and non-navigable waters.

Although voluntary wetland conservation efforts are commendable and should be encouraged, they cannot replace regulatory oversight and permitting processes. Effective planning must engage and inform the public and property owners about the importance of wetland protection. In addition to the important incentive programs that encourage property owners to conserve wetlands, there are a number of regulatory mechanisms that can successfully address the goal of wetland protection in the context of growth and development.

## ARGUMENT

### I. Wetlands Are A Critical Natural Resource In Need Of Protection

The great naturalist and writer Aldo Leopold eloquently explained in his essay "The Round River":

> If the land mechanism as a whole is good, then every part is good, whether we understand it or not. If the biota, in the course of aeons, has built something we like but do not understand, then who but a fool would discard seemingly useless parts? To keep every cog and wheel is the first precaution of intelligent tinkering.[2]

Wetlands are perhaps the most over-worked, undervalued and least understood and appreciated natural resource on the planet. In their natural state, they perform ecological functions which are vitally important to the environment and economic health of the nation and are impossible or costly to replace.[3] From flood protection, erosion control, storm water absorption, filtering of sediment and pollutants, aquifer recharge, fish and wildlife habitats, carbon sinks, and open space – wetlands are unsurpassed in their ability to moderate the damaging impacts from human activities and development.[4]

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[2] Leopold, Aldo, *The Round River*, Luna B. Leopold, ed. ROUND RIVER: FROM THE JOURNALS OF ALDO LEOPOLD, Minocqua, WI: Northwood Press, 1991.

[3] *See*, Bates, Sarah F., David H. Getches, Lawrence J. MacDonnell, Charles F. Wilkinson, SEARCHING OUT THE HEADWATERS – CHANGE AND REDISCOVERY IN WESTERN WATER POLICY, Island Press, 2003.

[4] *See*, Noss, Reed F., and Allen Y. Cooperrider, SAVING NATURE'S LEGACY: PROTECTING AND RESTORING BIODIVERSITY, Island Press, 1994.

Planners have an important role and responsibility in protecting wetlands. They help the public and elected officials understand the importance of the wetland resources; they assist in the preparation of community plans which balance the rights of the property owner with the needs of the community-at-large and the natural environment; they understand the multitude of land use tools available and prepare appropriate local regulations to implement the adopted plans; they help the property owner and developer navigate through the oftentimes complex regulatory world involved in wetlands protection; they continually reassess the effectiveness of their plans and land use tools; and they engage in public planning processes to update and amend the plans and regulations. Is protection of our nation's wetland resources worth this effort? The American Planning Association believes it is, because all wetlands, including isolated wetlands, perform valuable ecological functions.

Wetlands protect the quality of surface waters by retarding the erosive forces of moving water. They provide a natural means of flood control, protecting against the loss of life and property. The catastrophic flooding in New Orleans heightened the public's awareness of the critical role of wetlands as a natural approach to flood control. Wetlands improve water quality by intercepting and filtering out waterborne sediments, excess nutrients, heavy metals and other pollutants. Wetlands hold enormous amounts of carbon and thus are important in regulating climate as well as recycling carbon.[8]

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[8] Daniels, Tom and Katherine Daniels, THE ENVIRONMENTAL PLANNING HANDBOOK FOR SUSTAINABLE COMMUNITIES AND REGIONS, Planners Press, American Planning Association, 2003, at 229.